STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 15, 2014
v	No. 312113 Wayne Circuit Court
CHRISTOPHER MICHAEL JONES, Defendant-Appellant.	LC No. 11-008375-FC

Before: GLEICHER, P.J., and BORRELLO and SERVITTO, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of premeditated first-degree murder, MCL 750.316(1)(a), and arson of a dwelling house, MCL 750.72. The trial court sentenced defendant as a habitual offender, third offense, MCL 769.11, to life imprisonment for first-degree murder and 162 months to 40 years' imprisonment for the arson conviction. For the reasons set forth in this opinion, we affirm.

Defendant's convictions arise out of the August 5, 2011, stabbing death of Stephen Brinkley and the burning of Brinkley's home the same day. During the months preceding the crimes, defendant lived with Brinkley. In the early morning hours of August 5, 2011, the victim's neighbor, Troy Dunomes, who resided directly across the street from the victim, observed a man he identified as defendant exit the front door of the victim's home and walk away, without screaming, yelling, or saying anything. Dunomes noticed smoke coming from the back of the victim's house and grabbed his cell phone and called "911," while defendant walked to the corner of the street and disappeared. Firefighters responded immediately and, after containing the fire, discovered the victim's body inside the home. The victim had sustained multiple stab wounds, including wounds to his chest, abdomen, and eyeball, and had numerous incised wounds on his face and extremities. The medical examiner opined that the victim died from the stab wounds and found no evidence that he was alive at the time of the fire. Investigators did not find any evidence of a forced entry into the home and concluded that the fire was intentionally set. Testing by a forensic biologist revealed that blood collected from the interior of the front door of the victim's home and from a pair of boy's underwear found on the floor near the door matched defendant's DNA.

Three days after the fire, defendant appeared at the home of Yolette Bass. Bass testified that defendant did not look good and had wounds on his hands. The medical examiner reviewed

photographs of defendant's hands taken at the time of his arrest and testified that the wounds were "relatively fresh" or "days old." Defendant told Bass that he was in a fight and that there was a fire at his home. Police arrested defendant at Bass' home. Dunomes identified defendant in a live lineup as the man he observed leaving the victim's home on the morning of the fire.

Dunomes testified at the preliminary examination that he saw defendant leaving Brinkley's home the morning of the fire immediately before smoke emanated from the house. Sometime thereafter, Dunomes moved to Louisiana and refused to return to Michigan to testify at trial. Attempts to locate Dunomes were unsuccessful. The trial court allowed the prosecution to read Dunomes' preliminary examination testimony into the record at trial.

Defendant was convicted and sentenced as set forth above. This appeal ensued.

Defendant argues that Dunomes' preliminary examination testimony was inadmissible hearsay and its admission violated his constitutional right of confrontation.

We review a preserved evidentiary issue for an abuse of discretion. *People v Jackson*, 292 Mich App 583, 594; 808 NW2d 541 (2011). We also review a trial court's determination regarding whether the prosecution exercised due diligence in its attempts to produce an eyewitness for an abuse of discretion. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). An abuse of discretion occurs when the trial court "selects an outcome falling outside the range of principled outcomes." *People v Kowalski*, 492 Mich 106, 119; 821 NW2d 14 (2012). Defendant failed to raise a constitutional objection in the lower court; therefore, our review of his constitutional argument is for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999).

MRE 804(b)(1) provides that prior testimony of a witness is not excluded by the hearsay rule if the witness is unavailable and the defendant had an opportunity and similar motive to develop the testimony by cross-examination. *Bean*, 457 Mich at 682-684. Under MRE 804(a)(5), a witness is "unavailable" if he or she "is absent from the hearing and [the] proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means, *and in a criminal case, due diligence is shown*. [Emphasis added.]" *Id*. at 683-684 (quotation omitted).

A missing witness' preliminary examination testimony is admissible as substantive evidence under MRE 804(b)(1) only if the prosecution shows that it exercised due diligence in attempting to produce the witness. MRE 804(a)(5); *Bean*, 457 Mich at 684.

> The test for whether a witness is "unavailable" as envisioned by MRE 804(a)(5) is that the prosecution must have made a diligent good-faith effort in its attempt to locate a witness for trial. The test is one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it. [*Id.* (citations omitted).]

Having reviewed the record, we conclude that the prosecutor exercised due diligence in attempting to secure Dunomes' presence at trial. Here, the officer in charge of the investigation became aware that Dunomes relocated to Louisiana and the officer located Dunomes' new

address through the Marshal's Office in Louisiana. The assistant prosecutor then attempted to secure Dunomes' presence at trial by serving him with a subpoena to appear and assuring that he received it. Dunomes refused to cooperate, indicating that he was unwilling to testify because he feared he would lose his job if he returned to Michigan. Dunomes refused to disclose the name of his employer.

Thereafter, the prosecutor obtained a material witness detainer to apprehend Dunomes and send him to Michigan. The prosecutor sent the detainer to the prosecuting attorney's office in the locality in Louisiana where Dunomes was believed to be residing and a court ordered Dunomes brought before the court on the detainer and sent to Michigan. The prosecutor followed-up on the detainer by contacting a detective in Louisiana. The detective indicated that attempts to locate and apprehend Dunomes were unsuccessful. The prosecutor also attempted to call Dunomes numerous times and left voicemail messages, but Dunomes did not respond.

In short, these efforts were reasonable under the circumstances and the trial court did not abuse its discretion in holding that Dunomes was unavailable within the meaning of MRE 804(a)(5). Although defendant argues that the prosecution should have made additional efforts, due diligence requires the prosecution to do everything reasonable, not everything possible, to obtain the presence of the witness. *People v Eccles*, 260 Mich App 379, 391; 677 NW2d 76 (2004).

Additionally, to admit the former testimony of an unavailable witness under MRE 804(b)(1), the defendant must also have had a prior opportunity and similar motive to develop the witness' testimony by cross-examination. *Bean*, 457 Mich at 682-684. In this case, defendant had the opportunity and did cross-examine Dunomes during the preliminary examination. Defendant had a similar motive to develop the testimony during the preliminary examination as he would have at trial—i.e., in both scenarios he was motivated to challenge Dunomes' assertion that he saw defendant leaving the crime scene at the time the fire started.

In sum, we conclude that Dunomes was unavailable to testify at trial and that defendant had a prior opportunity and motive to cross-examine Dunomes at the preliminary examination. Therefore, the trial court did not abuse its discretion in admitting Dunomes' preliminary examination testimony as substantive evidence under MRE 804(b)(1).

Similarly, we find that admission of Dunomes' testimony did not violate the Confrontation Clause. An accused has the right to confront his accusers under both the state and federal constitution. *Bean*, 457 Mich at 682. The Confrontation Clause bars the admission of testimonial statements by a witness who does not appear at trial unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. *Crawford v Washington*, 541 US 36, 42, 51-52, 59, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *Jackson*, 292 Mich App at 594.

Here, it is undisputed that Dunomes' preliminary examination testimony was testimonial in nature, and thus, its admission implicates defendant's constitutional right of confrontation. See *Crawford*, 541 US at 68. In addition, Dunomes was unavailable at trial. However, as discussed above, defendant had a prior opportunity to cross-examine Dunomes at the preliminary

examination, and in fact did cross-examine him. Therefore, admission of the testimony did not violate the Confrontation Clause. *Id.*

Furthermore, contrary to defendant's assertion, because the prosecution exercised due diligence in attempting to secure Dunomes' presence at trial, defendant was not entitled to the "missing witness" instruction, M Crim JI 5.12, which provides that the jury may infer that the missing witness's testimony "would have been unfavorable to the prosecution." *Eccles*, 260 Mich App at 389-391. Where, as here, the prosecution exercised due diligence to produce the witness, the instruction is not required. *Id.* at 385.

Next, in a Standard 4 brief, defendant claims that the evidence was insufficient to establish that he was the person who committed the crimes.

We review a challenge to the sufficiency of the evidence de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). "When determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000) (quotation omitted). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *Id.* at 400 (quotation omitted). This Court must "draw all reasonable inferences and make credibility choices in support of the jury verdict." *Id.*

"[I]dentity is an element of every offense." *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). "[P]ositive identification by witnesses may be sufficient to support a conviction of a crime." *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000).

Defendant claims that the court improperly admitted Dunomes' preliminary examination testimony, without which the evidence was insufficient to establish that defendant was the person who committed the crimes. This argument lacks merit. As discussed above, the trial court did not err in admitting Dunomes' testimony. Viewing Dunomes' testimony and the other evidence in a light most favorable to the prosecution, we find that a rational trier of fact could reasonably conclude that defendant committed the charged offenses beyond a reasonable doubt. *Nowack*, 462 Mich at 399-400.

Here, Dunomes indicated that he observed defendant exit the front door of the victim's home in the early morning and walk away calmly as smoke began to emerge from the home. Evidence showed that the fire was intentionally set after the victim was murdered. Other evidence showed that there were no signs of forced entry and that defendant lived with the victim. A rational trier of fact could reasonably infer that defendant started the fire in an effort to conceal his involvement in the murder. See *People v Cutchall*, 200 Mich App 396, 398-401; 504 NW2d 666 (1993) (attempts to conceal involvement in a crime are probative of consciousness of guilt and are therefore relevant).

Furthermore, a forensic biologist testified that blood obtained from the interior of the front door of the victim's home and on a pair of children's underwear near the door matched defendant's DNA. Bass testified that defendant's had cuts on his hands when he appeared at her

house three or four days after the fire. Medical testimony showed that the victim suffered defensive wounds, indicating that the victim attempted to stop his attacker. This evidence would have allowed a rational juror to conclude beyond a reasonable doubt that defendant left his own blood at the crime scene because he cut himself when he stabbed the victim to death with a knife.

In sum, viewing this evidence in the light most favorable to the prosecution, we find that a rational trier of fact could conclude beyond a reasonable doubt that defendant was guilty of the charged offenses. *Nowack*, 462 Mich at 399. Although this case consisted largely of circumstantial evidence, "[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *Carines*, 460 Mich at 757.

Next, defendant claims that trial counsel was ineffective for failing to object to and "investigate" Dunomes' preliminary examination testimony. Contrary to defendant's assertion, counsel did object to Dunomes' testimony on evidentiary grounds. There was nothing to investigate. Moreover, as discussed above, Dunomes' testimony did not violate the Confrontation Clause; therefore, objection on constitutional grounds would have been futile and counsel is not ineffective for failing to raise a futile objection. See *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010) ("Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel.")

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Stephen L. Borrello
/s/ Deborah A. Servitto